In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-734

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN P. CALANDRA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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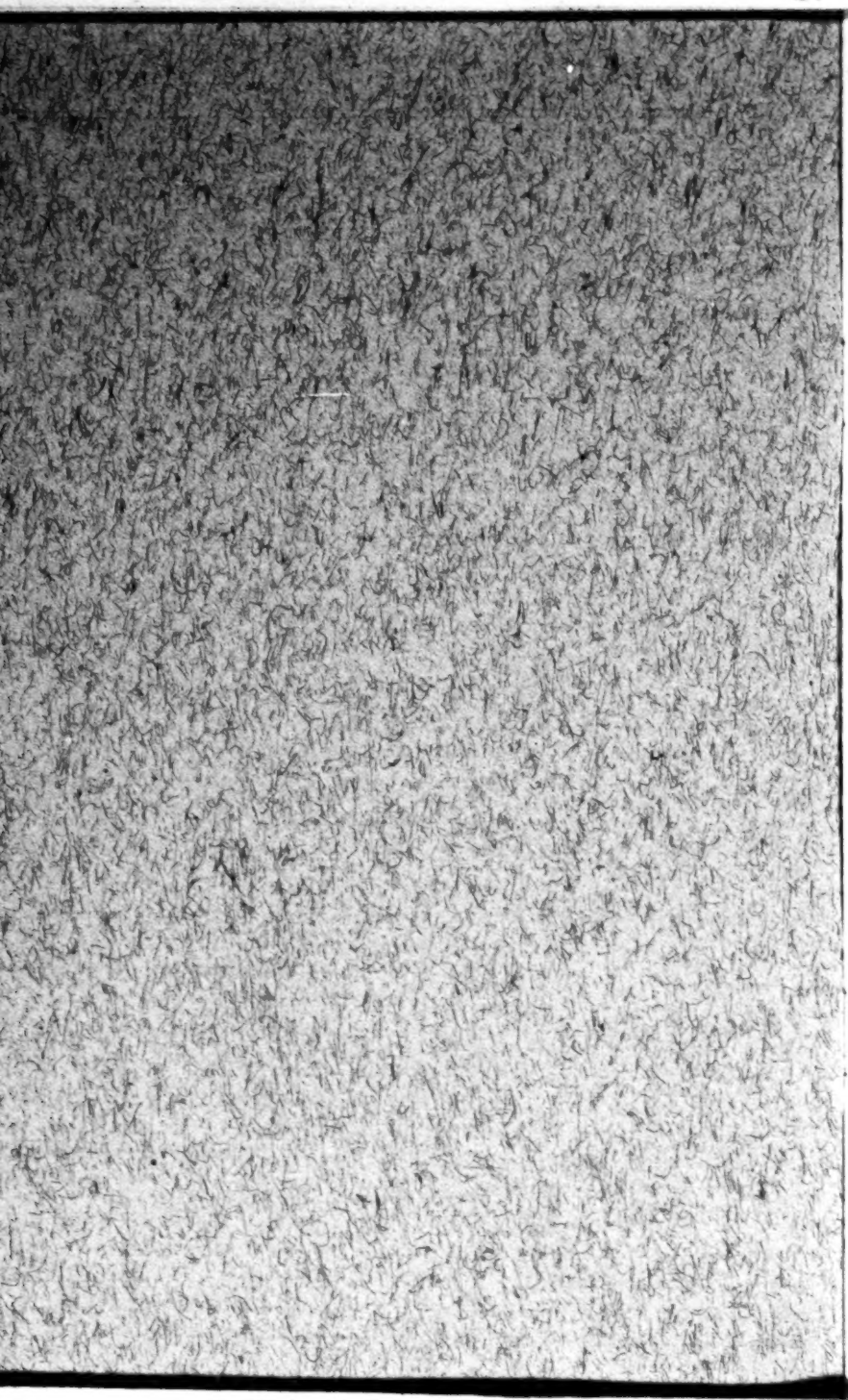

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OPINIONS BELOW

The opinion of the district court is reported as *In re Application for Immunity of John P. Calandra,* 332 F. Supp. 737 (N.D. Ohio 1971) and reprinted at page 27 of the petition for a writ of certiorari. The opinion of the court of appeals is not yet reported, but is set forth at page 11 of the petition.

JURISDICTION

This Court has discretionary jurisdiction in this case pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether the district court and court of appeals erred in permitting respondent, a grand jury witness, for whom the government sought a grant of immunity, to raise his rights under the Fourth Amendment in the immunity hearing after the government had conceded that all questions to be put to respondent were based upon material seized during a search which could be determined from the face of the warrant and affidavit to be clearly illegal.

2. Whether the government may expand the invasion of privacy resulting from an illegal search and seizure by compelling the victim to submit to questioning before the grand jury about the evidence seized.

STATEMENT OF FACTS

On December 15, 1970 federal agents executed search warrants directed at respondent John P. Calandra's residence and at his place of employment, the Royal Machine and Tool Company (A. 4a-6a, 83a).[1] The warrants were issued in connection with an investigation of suspected illegal gambling activities and called for the seizure of bookmaking records and wagering paraphernalia. An extensive and meticulous four hour search of the two-story building housing the Royal Machine and Tool Company (A. 91a-92a) failed to produce any significant evidence of illegal gambling activities (A. 5a-10a).

Nevertheless a wide variety of items and documents were seized, including books and records of the company, stock certificates and address books (A. 5a-10a). Among the documents seized were papers containing accounts of

[1] "A" refers to the joint appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court by the government.

periodic loan repayments to Calandra, which the government suspected might be loansharking records since the borrower was known to have been a victim of extortionate credit transactions (A. 127a).

Its curiosity piqued by the cryptic accounts of loan repayments, the government subpoenaed Calandra to appear before a special grand jury on August 17, 1971 to interrogate him regarding questions generated by the seized evidence (A. 195a). Calandra declined to testify, invoking his Fifth Amendment privilege not to incriminate himself. Whereupon the government moved the district court for an order granting Calandra immunity, pursuant to 18 USC §2514, and compelling him to testify (A. 37a). Calandra moved to postpone the immunity hearing on the ground that he had not been given prior notice required by F.R. Civ. P. 5(a), 5(b) and 6(d) (A. 44a), desiring to use the time afforded by the Rules to develop his contemporaneously filed motion for the suppression and return of the seized evidence (A. 47a, 52a, 85a). The district court granted the postponement and set the matter for an oral hearing to be held on August 27, 1971.

The government conceded that the questions intended to be put to Calandra before the grand jury were based upon the search and seizure of December 15, 1970 (A. 195a). Calandra stipulated that he would refuse to answer any questions before the grand jury even if immunized (A. 152a-153a).[2]

On the basis of the moving papers and stipulated facts, without necessity of evidentiary hearing, the district court

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[2] The government argued in the district court (but not in the court of appeals) that Calandra's motion was premature since he could make the motion in a contempt hearing. The district court disagreed. Because it was stipulated that the government intended to immunize Calandra and that he intended not to answer questions even at peril of contempt, the contempt route would have been a revolving door, returning the parties to their previous positions without changing their postures (Petition, App. D, at p. 30).

concluded that the search warrant was issued without probable cause and that the search exceeded the scope of the warrant, and issued its order suppressing the items seized, directing their return to Calandra, and specifying that he need not answer any questions before the grand jury based on the evidence in question (Petition, App. D, at p. 45).

On the government's appeal to the United States Court of Appeals for the Sixth Circuit, a three-judge panel of that court unanimously affirmed the judgment of the district court (Petition, App. A, at pp. 11-24).[3] The government now seeks to have this Court review that judgment by the issuance of a writ of certiorari to the Sixth Circuit Court of Appeals.

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[3] The court of appeals found it unnecessary to discuss in detail the questions pertaining to the validity of the search warrant and search, concluding in a footnote that "the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia, and further that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment." (Petition, App. A., at p. 23).

REASONS FOR DENIAL OF THE WRIT.

The decision below is not in conflict with any decision of this Court, and is, in fact, consistent with the spirit and rationale of numerous cases decided by this Court. The allegedly conflicting decisions of other courts of appeals are factually distinguishable in significant respects.

Although the basic constitutional issue as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions [4] should ultimately be resolved by this Court, such permanent resolution should await further experience in the lower courts to provide this Court with an empirical basis for accurately weighing the competing values involved. In any event, the instant case is a poor vehicle for resolving the issue, as its peculiar facts do not facilitate a meaningful assessment of those competing values.

ARGUMENT

1. Contrary to the impression sought to be conveyed by the government, the decision below is not in conflict with any decision of this Court. Although it is claimed that "grand jury witnesses traditionally have not been permitted to challenge the evidence that led the grand jury to call them," [5] none of the cases cited in support thereof so hold. Thus, *Costello v. United States,* 350 U.S. 359 (1956) and *Holt v. United States,* 218 U.S. 245 (1910) held only that a defendant could not challenge the indictment against him on the ground that incompetent evidence was presented to the grand jury, while *Blair v. United States,* 250 U.S. 273 (1919) determined that a witness could not challenge the constitutionality of the stat-

[4] The issue was expressly left open by this Court in *Gelbard v. United States,* 408 U.S. 41, 45 n. 5 (1972).

[5] Petition, at p. 5.

ute, the violation of which was the subject of the grand jury's investigation.[6] The reaffirmation in *Alderman v. United States*, 394 U.S. 165, 171 (1969) of the "established principle . . . that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence" by no means establishes the converse, i.e., that the victim of a Fourth Amendment violation has no constitutionally recognizable interest other than preventing the introduction of damaging evidence against him. *Alderman* left room for the assertion of Fourth Amendment rights under circumstances other than threatened incriminating use of the illegally seized evidence, declaring that "[t]he victim can . . . object for himself when and if it becomes important for him to do so." *Id.*, at 174.

In fact, the decision below is consistent with principles established by numerous decisions of this Court. Thus *Silverthorne Lumber Company v. United States*, 251 U.S. 358 (1920) established the right of grand jury witnesses to assert Fourth Amendment objections to demands for evidence; *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) recognized that the Fourth Amendment protects privacy by banning unreasonable searches and seizures wholly apart from their potential for incrimination; and *United States v. Ryan*, 402 U.S. 530, 533 (1971) reviewed the cases holding that the victim of an unlawful search and seizure is not to be deprived of appellate remedies merely because no criminal charge pends against him.

The question of whether a grand jury witness may rely upon the Fourth Amendment as a basis for refusing

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[6] But the *Blair* court indicated that there may be other "special reasons a witness may be excused from telling all that he knows." *Id.*, at 281.

to answer questions was expressly left open by this Court in *Gelbard v. United States, supra,* at 45 n. 5.

2. The issue of "the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions" involves, as do most significant constitutional issues, a balancing of interests. Unless a naked choice is to be made between privacy and the efficiency of the grand jury,[7] their reconciliation requires an assessment of the weight to be accorded the competing interests under the particular circumstances involved. Thus, a rational resolution of the issue posed herein would require information as to the actual extent of interruption and delay in grand jury proceedings which would ensue as a result of recognizing the Fourth Amendment rights of witnesses, as well as knowledge of the extent of the adverse impact on privacy flowing from refusal to entertain witnesses' Fourth Amendment claims. The government asserts that there would be substantial interference with the grand jury's function. Petition, at p. 5.[8] Conversely, it has been asserted that failure to recognize Fourth Amendment rights in grand jury proceedings would "cripple enforcement of the . . . Amendment." *Gelbard v. United States, supra,* at 66 (Mr. Justice Douglas concurring).[9]

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[7] Obviously the choice is not so simple. If privacy were to be preferred under all circumstances, the Fourth Amendment would tolerate no searches, while if efficiency in law enforcement were invariably supreme, it would prescribe no limitations on their conduct.

[8] The validity of the government's claim is at least an open question in light of the apparent effectiveness of grand juries notwithstanding the extension to grand jury witnesses of the traditional common law privileges, e.g., *Blau v. United States,* 340 U.S. 332 (1951), as well as of the constitutional privilege against self-incrimination embodied in the Fifth Amendment. *Hoffman v. United States,* 341 U.S. 479 (1951).

See also the views of both courts below that the procedure employed in the district court would not "unduly burden the functioning of the grand jury." Petition, at pp. 21, 34-35.

(Footnote continued on following page)

There is little or no empirical or jurisprudential evidence available with which to evaluate these contentions.

This Court's decision in *Gelbard* and the Sixth Circuit's decision in the instant case offer this Court the opportunity to observe in subsequent lower court cases whether or not permitting grand jury witnesses to assert their rights under 18 USC §2515 and the Fourth Amendment, respectively, unduly burdens the functioning of grand juries. Conversely, the different perspective of the Ninth and Second Circuits, *Carter v. United States*, 417 F. 2d 384 (9th Cir. 1969); *United States ex rel. Rosado v. Flood*, 394 F.2d 139 (2d Cir. 1968), will permit this Court to assess the effect on privacy of a divergent resolution in those circuits.

Accordingly, respondent urges the Court to deny the petition for certiorari to enable it to assimilate the experience of the lower courts before freezing the resolution of this issue into the relative permanency of a constitutional adjudication by this Court. In the words of Mr. Justice Frankfurter:

> "A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for

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[9] Measuring the resulting adverse impact on privacy involves not only an assessment of the extent to which the deterrent effect of the exclusionary rule will be mitigated, but also of the extent of direct infringements of Fourth Amendment interests which will occur in the grand jury proceedings themselves, such as in the instant case where the government seeks to continue and expand the invasion of privacy commenced in its illegal search, by compelling respondent Calandra to furnish it with additional information about the evidence illegally seized.

ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950).

3. Even if the Court is inclined toward a relatively prompt resolution of the issue left open in *Gelbard* as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions, the instant case is a poor vehicle for doing so. As a result of its peculiar facts, this case would not facilitate an examination and weighing of the competing interests involved.

Although the government asserts that the decision below permits "protracted interruption of grand jury proceedings", Petition, at p. 6, no such delay or interruption took place as a result of Calandra's assertion of his Fourth Amendment claim. The government was required to interrupt the grand jury proceedings for an immunity hearing before the court pursuant to 18 USC §2514 (A. 37a).[10] The continuance of the hearing from August 17 to August 27 was attributable to respondent Calandra's right to advance notice under Rules 5(a) (b) and 6(d) of the Federal Rules of Civil Procedure (A. 44a-46a, 95a). The government admitted that the questions it intended to put to Calandra before the grand jury were based upon the items seized during the search in issue (A. 195a). No "full blown suppression hearing" [11] was required, as the invalidity of the search warrant was determinable from the face of the affidavit, and the facts pertaining to the scope of the search were adduced through uncontroverted affidavits (A. 91a-94a). In effect, the "hearing was short in duration and largely devoted to the arguments of counsel on an agreed statement of facts." [12] (A. 149a-204a).

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[10] That such an interruption might no longer be required pursuant to 18 USC §6003 suggests only that the basic issue might more properly be resolved in such a case.

[11] *Gelbard v. United States, supra*, at 70 (Mr. Justice White concurring).

[12] *Id.* at 74 (Mr. Justice Rehnquist dissenting).

These same idiosyncratic facts serve to distinguish the instant case from such cases as *Carter v. United States, supra*, and *United States ex rel. Rosado v. Flood, supra*, which arrived at contrary results. It has been noted that

> ". . . differences between the Courts of Appeals in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved." Harlan, J., *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 552 (1958).

CONCLUSION

For all of the foregoing reasons and authorities the Court should await the perspective of experience in the lower courts and a more appropriate case before permanently resolving the issue herein, and therefore should deny the petition for a writ of certiorari.

Respectfully submitted,

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